

We Can Be Safe and Free

Gregory T. Nojeim

*Associate Director and Chief Legislative Counsel of the American Civil Liberties Union's
Washington National Office, Washington, DC*

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INTRODUCTION

I *do* think we need new terrorism laws. The USA PATRIOT Act,¹ enacted in October, was over 340 pages long. My organization, the American Civil Liberties Union (ACLU) objected on liberty grounds to approximately 12 of the 60 or 70 sections of the bill. The remainder included a number of provisions we support. I am going to say many things today that are critical of that legislation and of the conduct of the government in this war on terrorism. However, I also want you to know that we have supported a number of steps the government is taking, and we have not objected to most of them.

The proposals to which you may have heard ACLU object are proposals that we believe invade civil liberties, and do it unnecessarily. For those of you who are not familiar with the ACLU, we are not the largest and not the oldest, but one of the more prominent civil liberties groups in the country. We have approximately 300,000 members and we are based in New York City.

Our New York office is approximately ten blocks from where the Twin Towers used to be. On September 11, our Washington office, where I work, could not talk to our heart and brain in New York. We could not talk to our colleagues because their computers were down for three weeks, their telephones were down for a whole week, and their office building was inaccessible. We became an organization that was basically running our operations out of our office in Washington, D.C.

Things were not so great there, either. Our office is practically in the back yard of the Capitol Building, and across the street from Senator Tom Daschle's office. We are close enough to throw a stone from our office right into his. Now, after anthrax spores were found in his office, of course nobody thought about doing that.... Due to the events of

September 11 and the anthrax attacks, our office was evacuated three times. It was first evacuated on September 11, when the third hijacked plane was still up in the air, and no one knew whether it was bound for the Capitol building. We are only a block away from it, and on that day, I was not in the office long.

Immediately after September 11, there was a lot of conjecture and public discourse about curtailing civil liberties. We at the ACLU believe that the perpetrators of the September 11 crimes must be brought to justice. At the same time, our freedom, the essence of our character, must be protected as we respond to terrorism. We must be safe, but we believe that we must also be free, because our freedom is one of the things that make life worth living.

THE ROLE OF TECHNOLOGY

Technology has a role to play in the "Safe and Free" equation. It has a role on the safety side, but it also has a role on the freedom, liberty, and privacy side of the equation. In some ways, we believe that the government has not gone far enough to protect our safety. For example, I testified before Congress 5 years ago and suggested that airlines should be required to do what is known as a full luggage match on airline passengers, meaning that if the person who checked the luggage does not board the plane, their luggage is removed. That is a very simple concept and it has technological solutions. A full luggage match would not have prevented what happened, obviously, on September 11, but it would prevent other attacks on aviation security. That very simple step has not yet been taken. That step — employing technology to do a full luggage match — need not involve any damage to anyone's civil liberties. In fact, think about it: a full luggage match would mean that your checked luggage would actually arrive with you when your airplane lands. A novel customer service concept, but I think a very necessary security step. This is an instance where technology could be employed on the security side of the equation without harm to civil liberties — and where successful deployment of the technology would reduce pressure to take other steps that *would* harm civil liberties.

A number of actions that the government has taken go far beyond what is necessary to combat terrorism. They fall into four categories:

- Threats to checks and balances in our system;
- Reduction of government openness;
- Attacks on equality; and
- Reduction of privacy.

THREATS TO CHECKS AND BALANCES IN OUR SYSTEM

Everybody knows the basic structure of the government. An elected legislature protects against the usurpation of power by the Executive. A strong and independent judiciary is charged with protecting the rights of minorities, protecting the rights of the accused, and protecting the rights of the weak against the rights of the powerful. It is a delicate and balanced scheme central to our freedom, yet it has been put at risk by a number of actions that have been taken in the post September 11 world.

The USA PATRIOT Act upsets that balanced scheme. The PATRIOT Act includes many provisions that minimize judicial review, judicial oversight of electronic surveillance, and judicial controls over other searches that the government has engaged in or would like to engage in. For example, one provision of the USA PATRIOT Act² allows the government to compel an Internet Service Provider (ISP) to turn over to the government information about what Internet sites a person has visited. Though it would have to get a court order from a judge in order to compel the ISP to turn over this information, the judge is compelled to issue the order granting access anytime law enforcement agents merely certify that information relevant to an investigation is likely to be found. The judge's role is minimized because the order is issued upon mere certification by law enforcement, regardless of whether a judge finds probable cause of crime. The judge puts on a rubber stamp and the order is issued. That scheme protects the ISP because when law enforcement agents ask for customer information from the ISP, they do it with a court order upon which the ISP can rely, but it does not protect the privacy of the person who is surfing the Internet.

Please understand what I am saying here. I am not saying that the government should not have the power to learn where a person went on the Internet, nor am I saying that it should it not have the power to read a person's e-mail. What I am saying is that the matter should have to go to court for meaningful judicial review first. In order to get a court order to obtain such private information, probable cause of crime should have to be shown and there would have to be strong evidence that the person who is the target of the government's interest is involved in a crime. The USA PATRIOT Act minimizes judicial review of this form of electronic surveillance.

Another aspect of the reduction in the role of judicial officers in the post September 11 world is in the immigration context. The Attorney General has issued an order on October 26³ that virtually strips immigration judges of the power to decide whether a non-citizen who is awaiting immigration proceedings that will determine his immigration status, ought to be released. The immigration judge was essentially the impartial arbitrator of facts and the person charged with applying the facts to the law. The immigration judge is supposed to decide whether the government is acting lawfully with regard to an immigrant or whether it was acting unlawfully. Immigration judges had discretion to release such non-citizens awaiting immigration proceedings when the non-citizen proves that they would not flee, and are not dangerous. The Attorney General has now ruled that immigration judges no longer have the discretion to make the decision

about whether an immigrant will be released or not. The Attorney General has instead essentially determined that Immigration and Naturalization Service makes that decision.

Just recently, Attorney General Ashcroft proposed a different regulation that further marginalizes immigration judges. The overall theme of this regulation is that immigration judges and the Board of Immigration Appeals work for the Attorney General, and he will issue the orders that direct them on how they should interpret the law. That regulation has not yet gone into force but the Department of Justice proposed it in the Federal Register, and after a comment period, it will go into effect.⁴ Like the order discussed above, it amounts to a very dangerous taking away of authority from these neutral arbiters — the immigration judges and the immigration appeals board — and giving it to those who are not neutral — the accusers.

I am not saying that people who have violated immigration laws have a right to remain in the U.S. I am saying is that there ought to be a neutral person who decides whether they violated the immigration law or not. It is not the role of the Attorney General or the INS.

Another area in which the role of the judiciary was eroded was in the monitoring of attorney/client conversations. I am a lawyer. It is important to me if I have a client that I am able to communicate with that client confidentially. If I cannot, I am never going to learn from my client what really happened. I will not be able to mount an adequate defense of that person. The Attorney General issued a regulation⁵ that said that if a person is detained, the Attorney General can decide if that person's communications with their lawyer should be monitored. This is a very dangerous attack on the Sixth Amendment Right to Counsel.

It is also an indirect attack on the role of the judiciary, because the fact of the matter is that the Attorney General already had the power to listen in on those conversations. He could have done it already, not personally of course, but acting through the FBI. However, to accomplish that, law enforcement agents had to appear before a judge and prove that the detained person and his attorney were in cahoots in a criminal endeavor before getting a court order authorizing eavesdropping on their conversations. The regulation the Attorney General implemented writes the courts out of the process. Now, the Attorney General, not a judge, decides whether there is sufficient evidence that the detained person might be trying to further terrorist activity through his attorney, and the Attorney General decides whether conversations between them will be private.

Probably the most egregious example of writing the judiciary out of the equation of protecting rights was the President's military tribunals order.⁶ The President has issued an order that says he can decide which non-citizens accused of a crime get a jury trial with a judge presiding, and which non-citizens will not. Under the order, the President can decide who will be denied access to the evidence against them, and who will not. This is so even if two people have both engaged in exactly the same activity. Under the President's military tribunals order, if one is a non-citizen, and the other is not, the non-citizen can be denied the fundamental right of a jury trial.

This is a very dangerous precedent. It is a far cry from what happened in World War II. In World War II, President Roosevelt issued an order that allowed for the military trial of some Nazis who landed on our shores, removed their uniforms, and tried to commit crimes. This is very different, because in that case,⁷ President Roosevelt relied on an Act of Congress to order a military trial of the Nazis. Today, there is no such Act and unlike World War II, the war on terrorism has no clear, well-defined enemy or potential for a decisive end.

This is not some vague debate about the niceties of due process. This is the whole game. This is about whether one person — the President — can decide who has a constitutional right to a jury trial and who does not.

REDUCTION IN THE OPENNESS OF GOVERNMENT

The second area in which there has been a substantial erosion of one of the bulwarks of our freedom is in the area of openness of the government. Our country is really an experiment in liberty. It continues to experiment with different concepts of freedom. One of the things we have learned over this time of our experimentation, is that a government *of* the people and *by* the people has to be visible *to* the people. A number of positions that the government has taken post September 11 run contrary to that concept.

The most egregious one is the notion that the government could secretly detain well over a thousand people, and release really no useful information to the public about who it has detained and why. We met with the FBI and representatives from the Department of Justice seeking this kind of information. We filed a request for it under the Freedom of Information Act. When the government responded to our FOIA request, it produced little information, and it blacked out entire pages of what it did produce. We have to deal with this kind of secrecy increasingly today, in the post September 11 world.

I will illustrate the problem this creates by relating a story a colleague told me. He was listening to Arabic language radio in October 2001. Someone called the radio station and said that a family member had suddenly disappeared on September 11. He worked just a few blocks from the Twin Towers, so his family thought that he had perished in the attack. After not hearing from him for about a month, he showed up on their doorstep. His family asked him where he had been and told him that they thought he had been killed. He told them he had been detained by federal law enforcement agents. This is the United States of America. We do not secretly detain people. We do not engage in "disappearances."

However, I am afraid that is the road we are going down, and again, this is another very dangerous precedent. I am not saying that there is an absolute right to openness or that everything that the government does has to be visible to the people. I certainly would not say that near a nuclear laboratory. I am not saying that the troop movements in Afghanistan have to be visible to Americans, but what I am saying is that there is a

balance. The balance is shifting; it is shifting too far towards secrecy, and in some cases, unnecessarily towards secrecy.

Some of the provisions in the USA PATRIOT Act nurture this notion of secrecy. One of them allows for secret searches by law enforcement officials.⁸ It expands an existing authority to conduct secret searches for evidence of crime. You have seen how law enforcement searches are supposed to be conducted when you watch cop shows on TV. An agent arrives at a person's home. They knock and announce: "Hello, I am here from the FBI. I have a warrant to search your home." You ask them to show you the warrant. You look at the warrant and it says "602 Main Street." You inform them that you live on "603 Main Street" and that the address they are looking for belongs to your neighbor across the street.

Now, under the USA PATRIOT Act, we can expect the number of secret searches to rise. Instead of knocking on the door and identifying themselves as government law-enforcement agents, they will break into the person's home, secretly conduct a search for physical things, and even download what the person has on their computer. The person searched will not know of the search until months down the road, if the government indicts them for a crime. In the case of intelligence searches, they may never know at all.

This new secrecy also appears in the form of enforced silence in immigration proceedings. Shortly after September 11, the Attorney General required the Chief Immigration Judge to issue an order⁹ instructing immigration judges and immigration court personnel to keep immigration proceedings secret when they involve non-citizens held in connection with September 11. (The government admits that this practice involves 1,200 people, but it probably involves more, — approximately 1,500. The government has decided to keep secret the total number of September 11 detainees. Several months ago, it did indicate that there were 1,200 September 11 detainees.) According to the Attorney General's order, there would be no visitors, no family, and no press in any of these proceedings. One member of Congress found out the hard way that the order also covers members of Congress. He went to Detroit to attend an immigration proceeding, but at the door of the facility in which the proceeding was to take place, he was denied entry. A few weeks later, this Congressman, Rep. John Conyers (D-MI), introduced a bill that would, among other things, require that removal proceedings be made open to the public in most circumstances. I think that legislation¹⁰ faces a tough road.

ATTACKS ON EQUALITY

The third area in which there have been, I believe, unwarranted attacks on civil liberties is in the area of equality. The response from the government to September 11 has put at risk our commitment to equality and to equal justice under the law. New powers have been granted to the Department of Justice and they are being employed discriminatorily primarily against young Arab, South Asian, and Muslim men. This is happening in three areas.

The first area of concern is detention. The 1,500 or so that have been detained are overwhelmingly Muslims, Arabs, and South Asians.

The second area of concern is the questioning of non-citizens. The Attorney General has launched a program to question 5,000 visitors from Arab, Muslim, and South Asian countries. After the 5,000 interviews were done,¹¹ the Attorney General announced a program to question 3,000 more.

The third area of concern is the selective enforcement of deportation orders. Over 310,000 people now in the United States have been ordered deported and have not been removed. The Attorney General announced that the Department of Justice would focus its effort on removing 6,000 of those 310,000. Those 6,000 are young Arab, Muslim, South Asian men.

I cannot think of a clearer case of contemporary discriminatory profiling than to say, "We have 310,000 outstanding deportation orders. We are going to choose 6,000 of those to enforce based on these criteria: young adult male, from an Arab, Muslim or South Asian country." At a meeting last year, Kate Martin of the Center for National Security Studies explained the strategy like this: "The FBI has said that finding al Qaeda sleeper cells in the United States is like looking for a needle in a haystack. Their solution is to shrink the haystack."

REDUCTION OF PRIVACY

Finally, a few words about privacy. I am sure that we will get more into it in the question and answer period. There is a growing sense that civil liberties have been compromised in the area of privacy. We have to have some sense of history to understand why people are starting to feel this way. Back in the 1950's, 1960's, and 1970's law enforcement agents at the federal, state, and local levels were spying on people without any evidence of crime. They were spying on people who were thought to be dissidents, people who were engaged in the civil rights movement, anti-war protests, etc. Our country went through a very trying time and a question about what should be done about this spying. There was a growing sense that people could not freely engage in First Amendment activities, even if they were merely speaking their mind, and were not involved in crime. They were unable to dissent without interference from the government.

In response, ACLU and others launched a legislative effort to charter the FBI, and the charter would have barred it from spying on First Amendment activities. That effort was essentially cut off in 1976 when Attorney General Edward Levi promulgated guidelines that govern FBI investigations.¹² We think they are rather permissive Guidelines. Others might say the Guidelines tie the hands of the FBI. The Guidelines state that the FBI will not launch an investigation unless it has criminal predicate. There has to be "a reasonable indication of criminality" before the FBI can open a full investigation. However, the Guidelines also say that if a reasonable indication of criminality is lacking,

a mini-investigation called a "preliminary inquiry," can be started to investigate a lead without using the most intrusive investigative techniques. As we speak, the Attorney General is looking at ways to relax those investigative Guidelines to permit the very kind of spying without a criminal predicate that prompted the adoption of the Guidelines in the first place.

Another attack on privacy is the move toward a National Identification card. A National ID card would probably feature a biometric identifier. It would be issued either by the federal government or under standards set by the federal government. Sometimes, when people look in their wallets and see many identification cards already, they conclude that having one more is not a big deal. Please understand that this is a big deal. If these cards are issued or standardized, Americans will not be able to engage in normal, everyday transactions without presenting the card to clear themselves and the transaction. The card would constitute a tool for what Phillip Kunsberg was talking about (these proceedings, page XX) – the collection of information about your routine, everyday transactions: where you have been, what you have bought, who you were with, etc.

I am sure everyone agrees that, while airports are not "no privacy zones," some privacy compromises will be made at the airports to ensure safety. We believe that airport screening measures ought to feature minimally intrusive, but effective, scrutiny of everybody who is getting on the plane. There will be a strong effort to generate a technological solution to secure air transportation. If I could leave with you only one thought, one goal for the people in this room who may be working on these technological solutions, it is that you introduce a kind of a bias in any proposed technological solution. I want you to think about creating a pro-privacy bias as you develop technologies. If you can find a technology that does the job, that is effective, but does not invade a person's privacy, we urge you to develop *that* technology as opposed to a more intrusive one.

For example, the government is funding development of a number of machines that could be used to search passengers. It is testing some of them now. One employs a technology I have heard described as "backscatter X-rays." Machines employing this technology project an image of a person's naked body on a screen for the other people to see. The idea is take an electronic peek under the person's clothes for the gun or item of threat. The image produced is not very blurry. I have seen these images. The resolution is so good that the belly button of the subject is plainly visible on the screen. ... And gender determination ... is not a problem.

In contrast, another type of machine the government is testing for airport use puffs a whiff of air at a person. If the person is carrying an explosive, evidence of the explosive is dislodged and detected by the machine when the person walks through it. That system strikes me as far less intrusive than requiring passengers to "bare all" in order to get on the airplane. It is toward this less intrusive technology that we would urge an affirmative bias.

CONCLUSION

I have said some things today that are critical of the government's actions in the post September 11 world. Attorney General Ashcroft has attacked his critics as unpatriotic or un-American. However, what could be more American than at a time like this, standing up for the Constitution and the values of liberty and equality that it protects?

This is not about constitutional hair splitting. It is about preserving our way of life: *our* ability to move freely, *our* principles of equality, *our* right to a fair trial if wrongly accused, and *our* right to have a private conversation without fear that the government will listen in without a search warrant or without a court order. *These rights define America. They make it a special place.* As you go about your work, I ask you to own these rights.

Our commitment to these constitutional principles is being tested. The attacks that took place on September 11 were attacks not only on buildings. They have spawned a reaction that threatens fundamental interests of equality and privacy and government checks and balances. We must pass this test. You must pass this test. If we do not, the terrorist will have won.

GREGORY T. NOJEIM

Gregory T. Nojeim is the Associate Director and Chief Legislative Counsel of the American Civil Liberties Union's Washington National Office. The ACLU is a nationwide, non-partisan organization of nearly 300,000 members devoted to protecting the principles of freedom and equality set forth in the U.S. Constitution and civil rights laws. In this capacity, he coordinates the ACLU's legislative strategies, supervises its lobbyists, and helps to develop the ACLU position and message on pending legislation.

Prior to assuming his position with the ACLU, Mr. Nojeim was for four years the Director of Legal Services of the American-Arab Anti-Discrimination Committee (ADC). He conducted much of ADC's work in the immigration, civil rights, and human rights areas. Mr. Nojeim was employed for five years as an attorney with the Washington, D.C. law firm of Kirkpatrick & Lockhart where he specialized in mergers and acquisitions, securities law, and international trade. He was graduated Magna Cum Laude from the University of Rochester in 1981, where he studied Political Science. He received his J.D. from the University of Virginia in 1985 and sat on the Editorial Board of the Virginia Journal of International Law.

¹ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107- 56 (2001).

² Section 216, Pub. L. No. 107-56 (2001).

³ The order was made effective October 29, 2001.

⁴ More about the proposed regulation can be found in testimony ACLU Legislative Counsel Timothy Edgar presented Feb. 5, 2002 to the House Judiciary Committee's Subcommittee on Immigration and Claims, at its Oversight Hearing on the Operations of the Executive Office for Immigration Review. See: <http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm? ID=9367&c=97&Type=s>.

⁵ 66 Fed. Reg. 55062 (October 31, 2001).

⁶ President Bush's November 13, 2001 Executive Order authorizing the Secretary of Defense to convene military tribunals to try terrorism suspects can be found at 66 Fed. Reg. 57831 (2001).

⁷ Ex Parte Quirin, 317 U.S. 1 (1942).

⁸ Section 213, Pub. L. No. 107-56 (2001).

⁹ September 21, 2001 Memorandum from Chief Immigration Judge Michael J. Creppy to all immigration judges.

¹⁰ Section 125 of the Restoration of Fairness in Immigration Act of 2002, H.R. 3894, 107th Cong.

¹¹ Law enforcement agents actually interviewed only approximately one-half of the non-citizens they sought o interview; the other half were not found.

¹² The Attorney General Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations.